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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re JAMES B., a Person Coming Under
the Juvenile Court Law.

2d Juv. No. B255117
(Super. Ct. No. J1436431)
(Santa Barbara County)

SANTA BARBARA COUNTY CHILD
WELFARE SERVICES,

Plaintiff and Respondent,

v.

T. B. et al.,

Defendants and Appellants.

T.B. (Mother), L.T. (Father), and maternal grandparents R.B. (Grandfather) and R.B. (Grandmother) (collectively Grandparents) appeal from an order terminating parental rights. (Welf. & Inst. Code, § 366.26.) Mother and Grandparents contend the Santa Barbara County Child Welfare Services (CWS) and the juvenile court did not apply the statutory preference for relative placement, undermining the relative placement exception to termination of parental rights. (§§ 361.3, 366.26, subd. (c)(1)(A).)¹ We affirm the order terminating Mother's parental rights. We dismiss Father's appeal. (*In re Phoenix H.* (2009) 47 Cal.4th 835, 845.)

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

James B. was born in March 2013. Mother tested positive for methamphetamine. Father was incarcerated and did not provide for James. Mother was living in a one-bedroom apartment with Grandparents and James's three half-siblings. A social worker described the crowded room as neat and organized, but without any crib or bassinet and no room to install one. CWS detained James and placed him with a foster family. CWS identified relatives and notified them of the placement application process.

On March 20, 2013, the trial court ordered James detained and ordered supervised visitation for Mother, conditioned upon clean drug tests. Grandparents were present at the hearing. James was underweight and medically fragile.

When James was three weeks old, Grandparents submitted an application for placement. They were still living in the one-bedroom apartment with James's three half-siblings. Their home did not meet licensing requirements and James remained in foster care. James's placement never changed.

Mother's three older children were subject to an open voluntary family maintenance case when James was born. Mother did not participate in substance abuse services pursuant to that case. The case was dismissed in April 2013, when Grandparents agreed to seek legal guardianship of the older three children, with a safety plan in place to protect them from Mother. The Grandparents maintained daily contact with Mother.

Mother visited James twice, but did not appear for drug testing, had no other visits, and did not maintain contact with the social worker. Grandparents attended every hearing, but Mother missed four.

Father missed two appointments for paternity testing. He told a social worker he did not believe he was James's father. He had no contact with James.

In April 2013, Grandparents contacted CWS to request visitation. They reported that the half-siblings were asking to see James. CWS arranged monthly visits, which Grandparents consistently attended with the half-siblings.

On April 15, 2013, Grandmother contacted the social worker to say she and her husband had located a four-bedroom house. She said they wanted to have James

placed with them after they moved so they could become his legal guardians. She also told the social worker that "[Mother] is a good mom She comes over almost every day to see her children." By then, Mother had missed four court-ordered drug tests in James's case.

At the jurisdiction and disposition hearing, CWS reported that Grandparents "currently reside in a one-bedroom apartment which does not meet the licensing qualifications. The[y] have located a four-bedroom home which they plan on moving into soon so they can have James placed with them." The trial court set the matter for a contested hearing. In May 2013, it sustained the dependency petition and ordered reunification services for Mother. Grandparents were present. Mother and Father were not.

Neither the parents nor Grandparents filed a petition to modify James's placement when Grandparents moved into their new home that spring or when the home was approved by the licensing unit in October 2013. (§ 388.) The assigned social worker later reported that James was not moved from foster care because there was no need for a change in placement. James had extensive medical and physical therapy needs, all of which the foster family was meeting. Grandparents had three "high needs" children in their care and continued to have significant contact with Mother.

In November 2013, the trial court conducted a six-month review. It terminated services to Mother. Mother did not appear for the hearing. Before the hearing, CWS reported that Grandparents were "considered for placement, however, it was determined that they were not appropriate." James was diagnosed with epilepsy and cerebral palsy. He was receiving physical therapy, occupational therapy, and was working with a developmental specialist.

By the time of the section 366.26 hearing in March 2014, James had made "tremendous strides in his development" and was "extremely attached to his foster family." He appeared to be psychologically and emotionally healthy. He seemed to feel safe and secure in the home and looked to the foster parents for comfort, care and assurance. The

foster parents sought specialized services for James's medical and developmental care. Their participation and follow through were consistent. They were committed to adoption.

Before the section 366.26 hearing, Grandparents retained counsel. Their attorney appeared with them in court on March 6 for the hearing. Mother and Father did not appear. Mother's counsel acknowledged that Mother had not visited James, but told the court he would review whether any other exceptions to termination of parental rights applied and "get the contact information . . . from the Grandmother." The trial court continued the matter to March 20, and ordered Mother's counsel to file an offer of proof concerning any exception to termination of parental rights by March 13. Counsel did not file an offer of proof.

On March 6, Grandparents filed "Relative Information" forms (JV-285) in which they wrote that James is "robust and healthy," that they are guardians of his three half-siblings, and that they would like to serve as James's guardian "in order to a) keep the sibling group . . . together and b) to preserve the opportunity for James to know his mother."² They wrote that their "daughter does not want her parental rights terminated, but rather wants to have [them] become the permanent guardians of all her children." They attached letters in which they described their home, their extended family, and their positive professional backgrounds. They expressed confusion about CWS's unwillingness to place James with family.

In a supplemental report on March 18, CWS mistakenly advised the trial court that Grandparents had never filed an application for placement. CWS corrected its error the next day, reporting that Grandparents filed an application in April 2013, and their home was approved by the licensing unit in October 2013. CWS explained that there was no need for a change in placement at that time, and James's needs were being met by the foster parents.

On March 20, 2014, the trial court conducted the section 366.26 hearing. Both parents were present. Mother's counsel reported he did not file an offer of proof because "[in his] review of the file, [he] was not able to find any of the exceptions apply."

² The record does not demonstrate service of these forms on Mother or Father.

Grandparents were present with counsel. Grandfather told the court he and Grandmother had done everything the social workers had asked, and he was "beside [him]self to find out why [they] haven't gotten [James] months ago." He said, "I can't ever get a straight answer as to why we are not suitable" Grandmother said James's half-sisters "love their brother." She said she was present when James was born and would have taken him home if allowed. She was told they had to get a larger home, which they did.

The trial court terminated parental rights, identified adoption as the permanent plan, and set the matter for review on September 18, 2014. The court explained to Grandparents that it had not decided who will adopt James. It described the situation as "tragic," but explained it could only decide the legal questions presented to it.

DISCUSSION

Mother and Grandparents

Mother and Grandparents appeal from the March 20, 2014, order terminating parental rights on the ground that the trial court erred when it did not place James with Grandparents. Mother contends her counsel rendered ineffective assistance when he did not file a section 388 petition to modify placement on March 13, 2014. She contends that the court would have changed placement and Mother could then have successfully asserted the relative placement exception to termination of parental rights. (§ 366.26, subd. (c)(1)(A).)³ We reject these contentions. There is no appealable placement order, and it is not reasonably probable the court would have granted a section 388 petition at the section 366.26 hearing.

The trial court did not make an appealable order concerning placement at the section 366.26 hearing. (§ 395.) The court made one placement order, at the April 2013 dispositional hearing. No party appealed from that order. (*In re Meranda P.* (1997) 56

³ The relative caregiver exception to termination of parental rights applies if (1) a child "is living with a relative" who is unable or unwilling to adopt but is willing and capable of acting as a stable legal guardian, and (2) "the removal of the child from the . . . relative would be detrimental to the emotional well-being of the child." (§ 366.26, subd. (c)(1)(A).)

Cal.App.4th 1143, 1150 ["an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order"].) Moreover, CWS gave Grandparents preferential consideration in April 2013, consistent with section 361.3,⁴ but their home did not meet licensing requirements. (§ 361.3, subd. (a)(1)-(8).) Relative placement is entitled to preference when the child is removed and "whenever a new placement of the child must be made." (§ 361.3.) But James never needed new placement. His foster parents met all his needs and were willing and able to continue to do so.

The social worker's decision in October 2013 that James did not need new placement was not "arbitrar[y]" as Mother contends. James was seven months old, knew only one home, and had severe medical needs that were being met by his foster parents. Grandparents' home had been approved for licensing, but they were caring for three high-needs children and had continuing contact with Mother who continued to abuse drugs. CWS reported the decision not to change James's placement at the November 2013 hearing. Mother did not attend the hearing, the trial court terminated her services, and no party petitioned to change the placement pursuant to section 388 or appealed the November orders.

Grandparents contend the trial court should have treated their March 2014 "relative information" forms as section 388 petitions to change James's placement. We disagree. The forms were not filed until the date set for the section 366.26 hearing. They were purely informational and did not meet the procedural requirements of section 388. Grandparents were represented by counsel. This case is unlike *In re Esperanza C.* (2008)

⁴ At the time of removal, the county social worker and the court must consider (1) the child's best interest including special physical and medical needs; (2) the wishes of parents, relatives, and child; (3) the preference for relative placement stated in Family Code section 7950; (4) placement of siblings and half-siblings in the same home; (5) the moral character of the relative and other adults in the home; (6) the nature and duration of the relationship and the relative's desire to provide for permanency; (7) the relative's ability to provide for the child, protect the child from his parents, facilitate the court process, including implementation of the case plan, and to provide permanence if reunification fails. (§ 361.3, subd. (a)(1)-(8).)

165 Cal.App.4th 1042, in which the court was able to reconsider placement at the section 366.26 hearing when the parties filed section 388 petitions asking it to do so.

Mother's counsel did not render ineffective assistance of counsel when he did not file a section 388 petition in March in response to the trial court's request for an offer of proof. It is not reasonably probable that the court would have granted a section 388 petition. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) Circumstances had not changed between November and March. Neither Mother nor Grandparents could have shown by clear and convincing evidence that a change of placement was in James's best interest. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320 [in the context of a motion pursuant to section 388 for change of placement after the termination of reunification services, the predominant task of the court is to determine the child's best interest].) James had been in the capable care of his foster parents for one year since his birth. The focus had shifted to his need for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

This case is unlike *In re R.T.* (2015) 232 Cal.App.4th 1284, in which an order terminating parental rights was reversed for failure to give relatives preference. In that case, the paternal aunt requested placement within two weeks of the child's birth but CWS "never considered" her for placement. (*Id.* at p. 1293.) When the child was one month old, the juvenile court heard and refused requests for relative placement and ordered a permanent plan of placement with the foster parents. When the child was four months old, the aunt filed a section 388 petition seeking change of placement with a plan of adoption. The CWS supervisor testified that it approved aunt's home for licensing, but never considered it for placement. She testified that "relative placements do not receive preference." (*R.T.*, at p. 1294.) The juvenile court waited 10 months to rule on the section 388 petition and then denied it. Meanwhile, CWS abused its discretion when it refused to accept parental relinquishment of the child for adoption with designated relatives. (§ 361, subd. (b)(1); Cal. Code Regs., tit. 22, § 35181.) In this case, by contrast, CWS investigated Grandparents' home for placement within days of James's birth and considered the section 361.3 criteria. The issue of placement was not brought to the court's attention

again until James was one year old, at the section 366.26 hearing, and no section 388 petition was ever filed.

Father

We appointed counsel to represent Father on appeal. After examining the record and researching potential issues, counsel advised us in writing that she could not find any arguable issues to raise on Father's behalf.

Father's attorney notified Father that he may request permission from us to file a brief. On May 14, 2014, we notified Father that he had 30 days within which to submit any contentions that he wished us to consider. We did not receive a response.

DISPOSITION

We dismiss Father's appeal. (*In re Phoenix H.*, *supra*, 47 Cal.4th 835, 845.)

The order terminating Mother's parental rights is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Arthur A. Garcia, Judge
Superior Court County of Santa Barbara

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant T.B.

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